

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MIGUEL E. ADAME)	
Claimant)	
)	
VS.)	Docket No. 1,018,765
)	
EXCEL CORPORATION)	
Respondent/Self-Insured)	

ORDER

Claimant requested review of the September 19, 2007 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on December 4, 2007.

APPEARANCES

Scott Mann, of Hutchinson, Kansas, appeared for the claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, after the Award was issued in this matter, the parties entered into a Post-Award Stipulation which reflects the parties' agreement that claimant was a full-time hourly employee with an ordinary work week of 40 hours and a base pay of \$13.20 per hour.

ISSUES

There were three issues presented to the ALJ for determination following the Regular Hearing in this matter. Of the three issues, two are now brought before the Board for determination.¹ The first, average weekly wage, requires the Board to consider whether certain items should be added to claimant's base wages for purposes of calculating claimant's average weekly wage under K.S.A. 44-511. The second issue is the nature and extent of claimant's ultimate permanent impairment. The ALJ averaged the two opinions offered by the testifying physicians, thus assessing a 20.5 percent permanent partial impairment.

¹ The third issue, claimant's entitlement to future medical treatment, is no longer in dispute.

The claimant contends the uncontroverted evidence establishes that his average weekly wage should be increased by the value of overtime, break and premium differentials which yields a total average weekly wage of \$592.79. And claimant argues that Dr. Stein's use of the *Guides*² in rating his permanent impairment at 25 percent³ is more appropriate than the opinions expressed by Dr. Reed.

Respondent maintains that the ALJ's method of computing the claimant's average weekly wage was appropriate and should be affirmed. In the event the Board finds that the ALJ erred in her calculation, respondent suggests that \$528 per week is the appropriate average weekly wage. Respondent also contends that Dr. Reed's assignment of 16 percent permanent adequately compensates claimant for his injuries in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out the witnesses' testimony in such a way that is detailed, accurate and supported by the record. The Board further finds that it is not necessary to repeat those facts in this order. Therefore, the Appeals Board adopts the ALJ's recitation of the facts as well as the contents of the deponents' testimony as its own as if specifically set forth herein.

At the Regular Hearing the parties had yet to agree upon an average weekly wage. And as the case was tried and submitted, the parties were unable to reach any sort of compromise. As a result, the ALJ was compelled to address the issue of average weekly wage under K.S.A. 44-511 without the benefit of the parties' stipulation as to claimant's base wage of \$528 (\$13.20 x 40).⁴ Thus, at a minimum, the Award should be modified to reflect this figure as the base wage.

As noted by the ALJ, the calculation of claimant's average gross weekly wage also includes the overtime and shift differential payments.⁵ Here, claimant received an average of \$61.50 per week in overtime, \$3.23 per week in "break pay" and \$.06 per week in "night premium pay". All these figures are uncontroverted and contained on the printout provided by respondent. Rather, it is the method of calculation that respondent disputes.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

³ All ratings are to the whole body.

⁴ K.S.A. 44-511(b)(4)(B).

⁵ K.S.A. 44-511(a)(1).

Respondent argues that none of these items, beyond the base pay, should be included and that the gross figures should be divided by 26 weeks rather than the 24 weeks claimant actually worked.⁶ The Board finds these arguments disingenuous and inconsistent with the statute.

As set forth above, the Award is modified to reflect an average weekly wage of \$592.79, a sum that reflects the base wage of \$528 as well as an average of claimant's overtime, "break pay" and "night premium pay".

Turning now to the remaining issue of claimant's ultimate impairment rating, the parties' dispute boils down to a question of which physician's methodology is appropriate. Both physicians utilized the 4th edition of the *Guides* as required by K.S.A. 44-510e(a). Nonetheless, the *Guides* apparently provide alternative approaches to rating an individual's condition. Dr. Stein employed the injury model which results in a DRE category assignment, a methodology that is driven by an individual's diagnosis rather than the ultimate response to treatment. And in such cases, surgery, whether successful or not, does not change the ultimate rating.

Based upon his examination of claimant as well as a review of the earlier medical records, he concluded that claimant's condition qualified him for a DRE V, which yields a 25 percent permanent partial impairment.⁷ This finding was supported by the fact that claimant had undergone a 2 level fusion, which meant he had lost motion segment integrity, as well as documented radiculopathy. These objective findings led Dr. Stein to assign a 25 percent impairment as a result of claimant's accident.

Conversely, one of claimant's treating physicians, Dr. Reed, testified that he was of the opinion that claimant bore a 16 percent permanent impairment based upon Table 75 which utilizes the range of motion approach to rating disabilities. Dr. Reed refused to use the DRE categories and explained that it has been his long-time habit to utilize Table 75 when a patient, as here, has undergone surgery. According to Dr. Reed, his methodology is appropriate under the *Guides* in light of claimant's surgery.

When faced with these two differing approaches to rating claimant's impairment, the ALJ concluded that both physicians were equally persuasive and credible. Thus, she averaged the two and assessed a 20.5 impairment. The Board has considered this approach and finds her assessment to be reasonable. While it is true that the Act requires the medical practitioners to utilize the *Guides*⁸, Dr. Reed's testimony suggests that the *Guides* provide alternative methods of rating impairment other than just the DRE criteria.

⁶ Even respondent's brief includes calculations that divide claimant's gross wages by 24 weeks.

⁷ All ratings are to the whole body.

⁸ K.S.A. 44-510e(a).

And contrary to claimant's counsel's contention, it was not as if Dr. Reed *refused* to use the *Guides*. He did, in fact, use Table 75 within the *Guides*, thus meeting the requisites of the statute. The Board finds that there is no evidence that one rating is more reliable or accurate than the other. The ALJ's finding of 20.5 percent impairment is therefore affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 19, 2007, is modified in part and affirmed in part as follows:

The claimant is entitled to 2.75 weeks of temporary total disability compensation at the rate of \$395.21 per week or \$1,086.83 followed by 85.07 weeks of permanent partial disability compensation at the rate of \$395.21 per week or \$33,620.51 for a 20.50 percent work disability, making a total award of \$34,707.34.

As of December 31, 2007 there would be due and owing to the claimant 2.75 weeks of temporary total disability compensation at the rate of \$395.21 per week in the sum of \$1,086.83 plus 85.07 weeks of permanent partial disability compensation at the rate of \$395.21 per week in the sum of \$33,620.51 for a total due and owing of \$34,707.34, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Scott Mann, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent/Self-Insured
Pamela J. Fuller, Administrative Law Judge